IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

ELSA SKINNER-MORGAN, et al.,

Defendants.

Civil Action No. C-1-00-424

Judge Herman J. Weber

SKINNER WORK GROUP MEMORANDUM IN SUPPORT OF UNITED STATES' MOTION TO ENTER CONSENT DECREES

On January 17, 2001, the United States filed a motion seeking entry of the two consent decrees it previously lodged with the Court to resolve the United States' claims against all the defendants in this matter, who include all the plaintiffs, as well as most of the defendants, in the private cost recovery action before the Court in The Dow Chemical Company, et al. v. Acme Wrecking Co., et al., C-1-97-307 ("Acme Wrecking"). Those defendants who would perform the remaining remedial action at the Skinner Landfill (the "Site") under the Remedial Action Consent Decree, the ("Work Group ")[1] submit this brief memorandum in support of the motion for entry filed by the United States. For the reasons set forth in the Memorandum in Support of the United States' Motion to Enter Consent Decrees ("U.S. Memorandum") and below, the Work

[1] The "Work Group" consists of Anchor Hocking Corporation (Newell Rubbermaid, Inc.); Chemical Leaman Tank Lines; The Dow Chemical Company; Ford Motor Company; Formica Corporation; GE Aircraft Engines; General Motors Corporation; Henkel Corporation (on behalf of Cognis, successor to Henkel, on behalf of Emery Division of Quantum Chemical Corporation f/k/a National Distillers & Chemical Corporation, a predecessor to Henkel); King Container Services, Inc. King Wrecking Co., Inc.; Monsanto Company; OXY USA Inc.; and Velsicol Chemical Corporation.

Group concurs that both decrees should be entered by the Court and respectfully requests that the Court do so expeditiously so that construction of the remedy can be completed this year prior to the onset of winter weather conditions near the end of 2001.

I. THE SETTLEMENT PROCESS AND RESULTS ARE FAIR, REASONABLE, AND CONSISTENT WITH THE PURPOSES OF CERCLA

As the United States describes in some detail, both the process of reaching the settlements in this case and the settlements themselves are fair, reasonable, and consistent with the purposes of CERCLA. U.S. Memorandum at 22-32. In its Memorandum, the United States notes, among other things, that although it is unaware of the precise amounts being paid by the Work Group to finance and perform the remedial action required under the Remedial Action decree, the United States understands that "those amounts were based, in part, on the allocations of responsibility determined by the allocator during the ADR process." Id. at 27.

In fact, all the settlements in both this matter and in the private cost recovery action have been predicated on the results of the alternative dispute resolution ("ADR") process mandated by the Court in its Case Management Order in Acme Wrecking. That order required the parties, upon issuance of the Allocator's Final Non-Binding Allocation Report and Recommendations ("Allocator's Report"), to engage in intensive negotiations. Case Management Order, ¶ 18a. Consistent with the Order, a meeting was convened shortly after issuance of the Allocator's Report of all those parties whose alleged shares of responsibility at the Site, based on the Allocator's findings, were deemed to be more than "de minimis." All parties in that category, including all current nonsettlors[2] in the private cost recovery action who fall within the category and have not settled with the United States either, were invited to participate in both that and a number of subsequent meetings and conference calls in which the shares of these parties for the claims of both the United States and the cost recovery plaintiffs were negotiated at length based upon the Allocator's Report. These negotiations were intensive and conducted at arms length by experienced outside counsel for the purpose of forming the group of parties who, while denying liability, ultimately made a good faith offer to the U.S. Environmental Protection Agency (U.S.

[2]These nonsettlors are not parties in the instant U.S. action.

EPA) to conduct the remedy at the Site and negotiated the Remedial Action Consent Decree ("RA Decree") providing for the cleanup of the Site.

Once the Work Group was formed, that group began the process of negotiating settlements with the remaining so-called "de minimis" parties. The Work Group devised a settlement formula for those parties for the purpose of reaching settlements with them for the claims of both the Work Group (who would be incurring the full cost of the remedy) and the United States for its response costs. That settlement formula was shared with the United States, which deemed it a fair and reasonable settlement approach for all such parties (except for certain municipal government parties who settled under the terms of the Municipal Consent Decree and a group of parties similarly situated by virtue of being tied to the Site through alleged transshipments from another site).[3] In particular, settlement amounts based on that same formula were offered to all the current nonsettlors in the private cost recovery action who qualified for "de minimis" settlements, but who have failed to reach settlements with the United States.[4]

It is important to note, as well, that the United States did not "rubber-stamp" the findings of the Allocator with respect to these parties. Instead, it insisted that each party wanting to settle disclose the Allocator's findings with respect solely to that party so that the United States could independently evaluate the merits of that party's allocated share.

In short, the settlement process was a fair-minded one. All parties that were similarly situated were offered settlement on the same terms, and the settlement was substantively reasonable in that the settlement amounts were based principally upon an evaluation of the recommendations of an experienced neutral Allocator who conducted an extensive fact-finding process to develop his recommendations. The fairness and reasonableness of the settlements is perhaps best demonstrated, however, by the fact that the settlement offers made have been accepted by all but a handful of the more than 90 parties who participated in the ADR process.

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[3] In addition, certain "de minimis" parties settled on the basis of the results of the Preliminary Allocation Report.

[4] As with the "non-de minimis" nonsettlors referenced above, these "de minimis" nonsettlors are not parties to this action.

Put another way, the ADR process ordered by the Court achieved its purpose of avoiding protractive and expensive litigation not only with respect to the claims in the private cost recovery action in which ADR was ordered but with respect to the claims of the United States as well. See June 28, 2000 Status Report of Plaintiffs in Acme Wrecking; U.S. Memorandum at 22-24 (discussing uniform CERCLA case law favoring settlements to effectuate CERCLA's basic policy goals).

II. THE REMEDIAL ACTION CONSENT DECREE CONTAINS NUMEROUS SAFEGUARDS TO ENSURE THAT THE REMEDY WILL BE IMPLEMENTED IN A TIMELY AND ENVIRONMENTALLY PROTECTIVE MANNER AND, ONCE IMPLEMENTED, WILL BE SUBJECT TO PERIODIC REVIEW TO ENSURE THAT IT REMAINS PROTECTIVE OF HUMAN HEALTH AND THE ENVIRONMENT

The United States has demonstrated through its motion to enter the consent decrees, the memorandum in support, and U.S. EPA's response to comments, that the RA Decree is protective of human health and the environment. In fact, only one commenter has alleged otherwise. The concerns of this commenter appear to be largely speculative in nature and have been thoroughly addressed by the Department of Justice and U.S. EPA in their papers. Nevertheless, it is worth highlighting the numerous safeguards in the RA Decree which provide U.S. EPA with significant authority to: 1) oversee the timely and proper implementation of the work to ensure that it is consistent with the Remedial Action required by the RA Decree; 2) periodically review the effectiveness of the Remedial Action to make sure it is protective of human health and the environment once the work has been completed; 3) require additional work if necessary; 4) take over and perform the work itself if U.S. EPA determines that the Work Group is not conducting it in accordance with the RA Decree; and, 5) reopen the terms of the RA Decree if previously unknown conditions or information indicate that the Remedial Action is not protective of human health and the environment. In addition to these safeguards, the RA Decree requires the Work Group to assist U.S. EPA in providing information to the community on the

progress of the work and further provides that the Court shall retain its jurisdiction through the duration of the decree.

Under the terms of the RA Decree, the Work Group must effectively complete the Remedial Action by September 30, 2001, in order to allow U.S. EPA to conduct its pre-final inspection. RA Decree ¶ 12(e).[5] During the course of the Remedial Action, the Work Group must submit detailed monthly progress reports to U.S. EPA and Ohio EPA describing the Group's efforts towards achieving compliance with the RA Decree. RA Decree, ¶ 40. Additionally, in the event that any change occurs in the schedule for implementing the Remedial Action, the Work Group must give U.S. EPA advance notice in order to allow it to adequately perform its oversight activities. RA Decree, ¶ 41. In the event of any unusual occurrence, such as the unanticipated release of a hazardous substance during the implementation of the remedy, the Work Group has additional reporting and response obligations that go above and beyond the normal work requirements of the RA Decree. RA Decree, ¶ ¶ 42 and 58. All of the reports and plans submitted by the Work Group during the performance of the work are subject to the review and approval of U.S. EPA in consultation with Ohio EPA. RA Decree, § XII. Finally, in order to deter unjustified delays in implementing the work, the RA Decree subjects the Work Group to daily, stipulated penalties of up to $10,000 or daily statutory penalties of up to $25,000 for failing to meet certain deadlines. RA Decree, § XXVI.

Moreover, at the conclusion of the Remedial Action, the Work Group must submit a certification to U.S. EPA, signed by a registered professional engineer, indicating that the Remedial Action has been implemented in accordance with the RA Decree. RA Decree, § XVI. Only after U.S. EPA reviews and approves that submission will it issue a certification to the Work Group indicating that the Remedial Action is complete. Thereafter, the Work Group has

[5] The Work Group has indicated to the United States that it will need an extension of this date in the event that entry of the RA Decree does not occur by March 15, 2001.

ongoing operation and maintenance requirements, for up to 30 years, all of which will be overseen by U.S. EPA, in consultation with Ohio EPA, to ensure the long-term integrity of the remedy.

Numerous additional requirements of the RA Decree give U.S. EPA the authority to ensure that the remedy operates as it was intended. For example, pursuant to Section VII of the RA Decree, U.S. EPA, in consultation with Ohio EPA, will conduct reviews of the protectiveness of the Remedial Action every five years. The Work Group must assist U.S. EPA in conducting these reviews. In the event that U.S. EPA establishes as a result of these reviews that the Remedial Action is not protective of human health and the environment, it may select further response actions. RA Decree, ¶ 20. U.S. EPA then may, consistent with the reopener provisions of the RA Decree set forth in Section XXVII, require the Work Group to implement these additional response actions. RA Decree, ¶ 21.

In this case, the United States has determined that the remedy will be implemented properly by the Work Group. While it is very common for private parties to implement remedial actions, U.S. EPA does not simply trust any private party to implement such work unless it is confident that it can be done in accordance with the requirements of CERCLA. U.S. EPA's confidence has been earned by the Work Group here through the previously successful remedial efforts of members of the Work Group at the Site, the commitment of all of the Work Group members to the allocation process, the submission of a good faith offer to U.S. EPA, the negotiation of the RA Decree, and the Group's demonstrated commitment to work with community representatives to address their concerns. Nonetheless, in the highly unlikely event that the members of the Work Group fail to fulfill their joint and several obligations to implement the remedy, the United States has the clear authority under the RA Decree to take over the site work, complete the remedy, and seek its costs from these parties. RA Decree, ¶

126. Based on the commitments made by the Work Group to date and its working relationship with the U.S. EPA, the likelihood that the United States would have to exercise this authority is highly remote. Nevertheless, the RA Decree clearly provides the United States with this authority to protect the interests of the public. Finally, the consent decree also requires the Work Group to assist U.S. EPA with its community relations obligations and provides this Court with continuing jurisdiction in this matter. RA Decree, §§ XXXVI and XXXVIII.

Given all of these elements, the RA Decree provides numerous layers of significant safeguards to ensure that the Remedial Action is implemented in a timely and expeditious manner, and that the overall remedy remains protective of human health and the environment.

III. IN ORDER TO FACILITATE IMPLEMENTATION OF THE FINAL REMEDY FOR THE SITE, THE RA DECREE SHOULD BE ENTERED PROMPTLY

The United States has concluded that prompt implementation of the remedy set forth in the Remedial Action Consent Decree is in the public interest. That objective would obviously be furthered if construction of the entire remedy could be completed by the end of the calendar year, i.e., before the onset of winter conditions near the end of 2001, which would interrupt and delay completion of the construction until the spring of 2002. The Work Group believes that, barring extenuating circumstances and earlier winter conditions than normal, construction of the entire remedy should be possible in the year 2001 if the RA Decree is entered by March 15, 2001. Consequently, the Work Group respectfully requests that the Court enter the RA Decree by that date.

IV. CONCLUSION

The United States has demonstrated that the RA Decree meets the requirements of Section 122 of CERCLA. Moreover, as discussed above, the RA Decree contains numerous and overlapping safeguards to ensure both that the remedy is implemented promptly and, once implemented, that it will remain protective of human health and the environment. Entry of both consent decrees will also resolve all claims of the United States in its complaint in this matter,

and resolve all but a handful of the claims in the private cost recovery action in Acme Wrecking. Prompt entry of the RA Decree will ensure expeditious implementation of the final remedy for the Site. Accordingly, and because the settlements embodied in the decrees are fair, reasonable, and consistent with the purposes of CERCLA, both decrees should be entered forthwith.

Respectfully submitted on behalf of the

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing, Skinner Work Group Memorandum In Support Of United States' Motion To Enter Consent Decree, was served by regular U.S. Mail, postage prepaid,this 13th day of February, 2001 by Michael O'Callaghan from Columbus, Ohio.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

v

Civil: C-1-00-424

ELSA SKINNER MORGAN, et al,

Defendant

ORDER

Parties are advised that the above styled case is SCHEDULED for a Hearing on Monday, April 2, 2001 at 10:00 a.m., in the Potter Stewart Courthouse, 100 East 5th Street, Courtroom 801, Cincinnati Ohio.

The Court at that time will consider Plaintiff's Motion for Leave to enter Consent Decree (#9). The Court hereby directs that the law office of Roger Makely, Esquire shall serve a copy of this Order to all interested parties and/or objectors.

IT IS SO ORDERED.

Herman J. Weber, Judge
United States District Court

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. ELSA SKINNER-MORGAN, et al., Defendants.	Civil Action No. C-1-00-424 Judge Herman J. Weber

ORDER

The motion of Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency, to amend the complaint in this action pursuant to Federal Rule of Civil Procedure 15(a) was filed on January 18, 2001. The Court has reviewed the papers submitted and considered the arguments of counsel as well as the authorities cited.

IT IS ORDERED THAT the United States' Motion to Amend the Complaint is GRANTED.

Dated: _____

UNITED STATES DISTRICT JUDGE

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